The English authorities cited may differ from this view because the issues involved relate to the terms of the insurance policy. In *Harman* v. *Crilly*[2] the Court of Appeal allowed the insurance company to be made a third party in an action for personal injuries when the action is tried by a judge alone on the ground that there was no possible reason for suggesting that the presence of the insurance company as a third party will be calculated to embarrass or prejudice the fair trial of the action. However the issue between the defendants and the insurance company related to the construction of the insurance policy itself in view of certain events which took place after the transfer of the business and the lorry and the matter of payment of premiums by the defendant company and their acceptance by the insurance company. Earlier in *Jones* v. *Birch Brothers Ltd.*[3] the main issue of which referred to an arbitration clause which requires reference to arbitration in the event of any difference between the insurance company and the insured under the policy, the Court of Appeal agreed to the stay of third party proceeding made by the trial judge because they might have the result of rendering the policy inoperative. The *Scott* v. *Avery*[4] part of the arbitration clause was merely an agreed additional way of enforcing the agreement and was not affected by section 38 of the Act of 1930. However in *Carpenter* v. *Ebblewhite & Ors.*[5] the Court of Appeal granted the defendants' application to strike out the plaintiff's claim as against the insurers for a declaration that they were obliged to satisfy any judgment obtained by the plaintiffs against the defendants in an action for damages for negligence for injuries suffered in a road accident. This was not a third party application but the principle applied was that the liability of the insurers has not arisen before any judgment has been obtained in a dispute between the plaintiffs and the defendants and in the absence of any actual dispute between the plaintiffs and the insurers, the court has no power to make a declaration of the insurers' liability.

The present case as I have said, depends on the provision of subsection (1) of section 80 of the Road Traffic Act. I therefore hold that the learned Magistrate erred in not setting aside the Third Party Notice. The appeal is allowed with costs. The third party order is accordingly set aside.

Appeal allowed.

Solicitors: *R. Rajasingam & Co.; Brijnandan Singh Bhar & Co.*

THANGAVELU v. CHIA KOK BIN

[O.C.J. (Sim J.C.) July 14, 1981]
[Kuala Lumpur — Civil Suit No. 3272 of 1977]

Torts — Negligence — Damages — Boy of 13 years old knocked down by motor car — Boy in state of coma after accident until death — Not totally unconscious — Claim for pain and suffering — Claim for loss of expectation of life — Claim for loss of dependency — Claim for loss of future earnings — Civil Law Act, 1956, ss. 7 & 8 — Interest.

Damages — Fatal accident — Boy in state of coma after accident until death.

In this case the plaintiff's son was killed in a road accident and the plaintiff sued as administrator of the estate. Liability was agreed at 50/50 and the dispute was as to quantum of damages. The boy was aged 13 and was working part time for a Chinese contractor. After the accident he was in a state of coma but not totally unconscious until he died. The claims were as follows:

(1) Claim for pain and suffering;

(2) Claim for loss of expectation of life, under section 8 of the Civil Law Act;

(3) Claim for loss of dependency under section 7 of the Act;

(4) Claim for loss of future earnings under section 8(2)(c) of the Act;

(5) Special Damages agreed at $850.00.

Held: (1) in this case there was an element of pain and suffering as the patient was not totally unconscious after the accident and the sum awarded would be $20,000 for pain and suffering and loss of amenities;

(2) the amount for loss of expectation of life would be assessed at $4,000;

(3) there was loss of dependency in this case and the amount would be assessed at $14,185.60;

(4) it is well settled law that the plaintiff is entitled under section 8(2)(c) of the Civil Law Act to claim damages for loss of future earnings of his son for the benefit of the estate. The amount for loss of future earnings would be assessed at $13,456.80;

(5) as the award for the benefit of the estate under section 8 exceeds the award for loss of dependency under section 7 the claim under section 7 is eliminated or extinguished by the amounts to be awarded under section 8 of the Civil Law Act, 1956.

Cases referred to:-

(1) *Andrews* v. *Freeborough* [1966] 2 All E.R. 721.
(2) *Wise* v. *Kaye* [1962] 1 Q.B.D. 638.
(3) *How Ke Ling* v. *Gui Tiang Siang* F.C. Civil Appeal No. 172 of 1978.
(4) *Cookson* v. *Knowles* [1977] 2 All E.R. 820; [1978] 2 All E.R. 604.
(5) *Pickett* v. *British Rail Engineering Ltd.* [1979] 1 All E.R. 774.
(6) *Oliver* v. *Ashman* [1961] 3 All E.R. 323.
(7) *Kandalla* v. *British Airways Board* [1980] 1 All E.R. 341.
(8) *Gammell* v. *Wilson & Anor.* [1980] 2 All E.R. 557.
(9) *Gammell* v. *Wilson & Ors.* [1981] 1 All E.R. 578.
(10) *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee, Malaysia* [1970] 2 M.L.J. 151.
(11) *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.

CIVIL SUIT.

R.K. Nathan for the plaintiff.

K.W. Woo for the defendant.

Cur. Adv. Vult.

Sim J.C.: An accident took place on November 9, 1974, when a cyclist on the Kuala Lumpur/Kajang

Road proceeding towards the direction of Seremban was knocked down by a motor car driven by the defendant coming from behind him. He died on October 15, 1975. The plaintiff, sues as administrator of the estate of his deceased son, the cyclist Subramaniam. At the time of accident he was 13 years old.

On the day of hearing after the plaintiff and the defendant had given evidence, liability for the accident was agreed by parties at 50/50. Submissions were then heard as to the quantum of damages to be awarded to the plaintiff.

For the purpose of assessing quantum the claims can conveniently be listed under five heads, they being:

1. Claim for pain and suffering until death, i.e. from November 9, 1974 to October 15, 1975;
2. Claim under section 8 of the Civil Law Act, 1956, for loss of expectation of life;
3. Claim under section 7 of the said Act for loss of dependency;
4. Claim under section 8(2)(c) of the said Act for lost years; and
5. Special damages which has been agreed at $850.

Claim Under Head One

After the accident Subramaniam was taken to the Kajang District Hospital in a state of coma (Coma IV) with haematoma on left temporal region and abrasions over left knee and left forearm (see Exhibit AB6). From the District Hospital the patient was later transferred to the General Hospital at Kuala Lumpur. On admission he was on examination found to be in a state of coma responding to deep pain only. He underwent an emergency operation on the evening of the same day. As post-operatively the patient did not show any improvement in spite of intensive care, and as his condition was getting static and as he needed no further neurosurgical treatment he was discharged from the General Hospital and transferred back to Kajang District Hospital on November 26, 1974. He subsequently passed away on October 15, 1975, i.e., eleven months and six days after the accident.

Although he was in a state of unconsciousness, the boy before his death was not totally unconscious as was the case of the eight year old child in *Andrews* v. *Freeborough*[1] who was unconscious for about a year; and the young woman of twenty years in *Wise* v. *Kaye*[2] who lay unconscious in hospital for three and a half years. While generally I agree with the submission of counsel for the defendant that the more conscious the injured was of his condition the greater must be the amount of damages to be awarded, and that if a person was not conscious at all, there should be no award or the award should be nominal, in the instant case the boy was, as I said, not totally unconscious. The medical report of the General Hospital, Kuala Lumpur, on the patient (Exhibit AB7) as to his head injuries was as follows:

"On examination the patient was in a state of coma, responding to deep pain only. He was noted to have a scalp hematoma at the left side and a right hemiparesis. The left pupil was dilated and fixed to light, the right was constricted. Blood pressure was 110/80. Abdomen and chest was normal on examination. Skull x-ray showed a depressed fracture of left parietal bone. He underwent an emergency operation on the evening of admission. Small amount of epidural clot was found over the temporal and parietal region. The brain tissue beneath the depressed fracture was badly contused, no subdural hematoma was found."

His father's evidence (which was not contradicted) was that whenever he called his son by name he would respond with a sound. To put it at the highest, therefore, the boy in the months before his death was only conscious of familiar voices. Most probably, he was in a state of consciousness in which pain could be appreciated but what is difficult to determine in a case such as this is whether in the state he was in he suffered much to financially benefit his estate substantially under this head of claim for general damages for pain and suffering.

In *Andrews* v. *Freeborough* it was held that notwithstanding that the child of eight years, from the time of her being injured until her death nearly a year later was unconscious and without pain and without appreciation of what had happened to her, she would have been entitled if she had lived to recover, in addition to damages for loss of expectation of life, substantial damages in respect of the injuries sustained which resulted in the loss of her faculties for nearly a year. In that case, the child sustained severe brain injury in a motor accident and lost consciousness at once. The trial judge awarded the sum of £2,000 in respect of actual injuries and the consequent loss of amenities. The Court of Appeal found no sufficient reason to interfere with this award of £2,000. In *Wise* v. *Kaye*,[2] the same Court of Appeal in an earlier decision had held that the fact that a plaintiff would be unable to enjoy personally any award of damages, and (except as an element of damages for pain and suffering) was ignorant of the loss suffered was irrelevant. This was a case where the plaintiff received serious brain injuries in a motor car accident and as a result never recovered consciousness with no prospect whatever of recovery.

In the present suit, there existed an element of pain and suffering though in my opinion it was not of a high degree. As in cases where a patient had been totally unconscious after an accident and as far as could be ascertained had suffered no pain, a substantial award of £2,000 had been awarded by way of pain and suffering (*Andrews* v. *Freeborough*) following upon the earlier case of *Wise* v. *Kaye* where an award of £15,000 by way of general damages was ordered, I would in the particular circumstances of the present suit assess the sum of $20,000 for pain and suffering and loss of amenities.

Claim Under Head Two

As to this claim under section 8 of the Civil Law Act, 1956, for loss of expectation of life, the usual conventional figure for damages under this head has always been $3,500. However, following the Federal Court award of $4,000 in the case of *How Ke Ling* v. *Gui Tiang Siang*[3] (Federal Court Civil Appeal No. 172 of 1978 unreported) — *Dass* on Quantum in Accident Claims, Vol. 2, page 441, I would also assess a similar sum for loss of expectation of life.

Claim Under Head Three

This claim is under section 7 of the Civil Law Act, 1956, for loss of dependency and is for the benefit of the parents of the deceased boy. The evidence of the plaintiff, Thangavelu, was that he had a wife and nine children (including the deceased) to support. He is still the sole breadwinner of the family and the deceased was his eldest son. The deceased attended school in the morning. After school he was, at the time he met with the accident, working for a Chinese contractor manuring and weeding rubber trees. This part-time work the deceased did only after he had had his lunch. The contractor used to pick him up for work at 2.00 p.m. and return him to the house at 6.00 p.m. The boy was paid $5.00 per day plus overtime. The plaintiff stated his son handed to him $40 per week which was all that the boy received from the Chinese contractor. This would amount to $160 per month. Out of this sum his son's monthly meals at the house cost him $30 and he used to give the boy $20 per month as pocket money. By his son's death he had therefore been deprived of the benefit of the sum of $110 per month by way of financial support.

Counsel for the defendant objected to his claim for loss of dependency as there was no corroborative evidence as to this part-time employment. I accepted the evidence of the plaintiff that the boy worked under the contractor although the employer was not called to give evidence. In fact the plaintiff had planned to take him out from school so that he could be engaged in full-time employment, and with his fuller earnings obtain greater financial support for his large family. There was another objection by counsel for the defendant who submitted, although not seriously pursued, that as employment of children under the age of fourteen was contrary to the provisions of the Children and Young Persons (Employment) Act, 1966, and as the resultant income was illegally earned, it was against public policy for the plaintiff to claim dependency based on the income of a child or young person. I would hasten to add that this point was not raised in the pleadings up till the date of hearing. Counsel for the plaintiff was therefore completely taken by surprise.

Since this matter has been brought up in the submission I would say this. The employment of children under the age of fourteen in non-family business is no new phenomenon in our country; neither is the utilisation of a major portion of that income to help support a poor family, especially if the family is a large one, as in this case, with only one other member gainfully employed. The plaintiff might have acquiesced in the contravention of the provisions of the Children and Young Persons (Employment) Act, 1966, in permitting the deceased to be engaged in the part-time job after school hours and the Chinese contractor had certainly contravened the said provisions by employing him about four hours each day which would explain the lack of corroborative evidence from the Chinese contractor as to his employment of the boy Subramaniam.

I find as a fact that the deceased did earn money to supplement the income of his parents. I do not think the plaintiff was exaggerating when giving the figure $5 per day as wages for part-time work. Neither, in my opinion, was that sum an unduly excessive figure for the work the boy did in the afternoons after school. I will accordingly fix the actual loss of financial benefit to the parents at $110 per month.

For the purpose of assessment of damages under this head I propose to follow the guidelines set out in *Cookson* v. *Knowles*[4] (affirmed by the House of Lords) by dividing the award into two parts, the first being the actual pecuniary loss up to the date of trial and the second being future pecuniary loss from date of trial. As a period of 77 months has passed since date of accident the pre-trial loss is exactly $8,470. As to future pecuniary loss from date of trial onwards I would give a multiplier of 5 years which according to actuarial tables is $5,715.60. The father of deceased, a labourer in the employ of the Public Works Department, is today aged 50 years. The total figure for loss of dependency is therefore $14,185.60.

Claim Under Head Four

This claim by the estate of the deceased is for loss of future earnings which the deceased had been deprived of by the defendant's negligence. This is a claim under section 8(2)(c) of the Civil Law Act, 1956, and is according to counsel for the plaintiff a novel claim for which reason I shall deal with it at some length. This claim is related to the probable future earnings of the deceased Subramaniam during the years that have been described by Lord Wilberforce as the "lost years" in *Pickett* v. *British Rail Engineering Ltd.*[5]

Pickett's case was one where the plaintiff brought an action against his employer claiming damages for personal injuries or physical harm. The trial judge awarded him damages under various heads including a sum for loss of earnings (based on the finding that the deceased's expectation of life had been reduced to one year from the date of trial and the loss of earnings related to that period of likely survival) which he could have expected to earn during his shortened life expectancy. He appealed against this portion of the award to the Court of Appeal but before the appeal could be heard he died and his widow as administratrix of his estate was substituted as plaintiff. The decision of the Court of Appeal, following authority, *Oliver* v. *Ashman*,[6] left undisturbed this award of future earnings, holding that the damages for loss of future earnings beyond the period of likely survival were not recoverable. Pickett's widow appealed to the House of Lords against the court's refusal to award any sum for loss of earnings beyond the period of likely survival contending that a much larger amount ought to have been awarded in respect of future earnings. Her appeal was allowed by the House of Lords which held that where a plaintiff's life expectancy was diminished as a result of the defendant's negligence, the plaintiff's future earnings were an asset of value of which he had been deprived and which could be assessed in money terms, and were not merely an intangible expectation or a prospect to be disregarded in the assessment of damages, since what he had been deprived of was the money over and above that which he would have spent on himself and which he would have been free to dispose of as he wished, and not

merely something which was of no value to him if he was not there to use it. In accordance with the principle that a plaintiff was entitled to be compensated for the loss of anything having a money value his loss of future earnings was to be assessed as a separate head of damages and not merely included as an element in the assessment of damages for loss of expectation of life. The House also held that the damages to be awarded to the plaintiff whose life expectancy was diminished was therefore to include damages for economic loss resulting from his diminished earning capacity for the whole period of the plaintiff's pre-accident expectancy of earning capacity and not merely the period of likely survival. Those damages were to be assessed objectively, disregarding loss of financial expectations which were too remote or unpredictable and speculative, and after deducting the plaintiff's own living expenses which he would have expended during the "lost years" since they would not have formed part of the estate.

Pickett's case, was followed by *Kandalla* v. *British Airways Board.*[7] *Kandalla's* case was a claim by the administrator, a father, on behalf of the estate of each of his two deceased daughters who died in an air crash. The plaintiff's claim, among other listed heads for damages, was that each of the estates was entitled to recovery of a substantial sum in respect of the earnings which his deceased daughters might have been expected to earn during their working lives if they had not been prematurely killed. It was contended by the defendant that such a claim did not survive for the benefit of the deceased's estate as it was only where a victim brought an action in his own lifetime that he could be awarded damages in respect of "lost years". It was held in *Kandalla's* case that on principle a claim for "lost years" could survive for the benefit of a deceased estate.

The basic difference between the claims in *Pickett's* case and that in *Kandalla's* case was that Pickett's widow continued with her action at the Court of Appeal against the British Rail Engineering Ltd. as administratrix of the estate of Pickett after her husband's death whilst in *Kandalla's* case the father brought the action against the British Airways Board as administrator of the estates of his two daughters. The similarities in these two cases were: —

(i) Both were for the benefit of the estate, and

(ii) The claim for the "lost years" was pursued under section 1(2)(c) of the English Law Reform (Miscellaneous Provisions) Act, 1934, (hereinafter referred to as the Law Reform Act, 1934) which is *in pari materia* with section 8(2)(c) of our Civil Law Act, 1956.

The relevant provisions of section 8 of our Civil Law Act, 1956, are as follows:

"8(1) Subject to this section, on death of any person all causes of action subsisting against, or, vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person — ....

(c) where the death of that person has beeen caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included."

The next decision, in chronological order, with respect to this claim by a plaintiff as administrator to recover damages for the benefit of the estate of a deceased person for the "lost years" under the Law Reform Act, 1934, was *Gammell* v. *Wilson & Anor.*[8]

In that case, the plaintiff's 15 year old son was killed in a road accident by the defendant's negligence and the trial judge awarded damages for his son's loss of future earnings during the years of life lost to him on the basis of what the deceased would have earned, less deduction of his living expenses. The defendant being dissatisfied with the award appealed to the Court of Appeal.

It was held by the Court of Appeal that where a person died in consequence of a defendant's negligence before he himself could bring an action for damages or prosecute it to judgment, his estate was entitled to recover damages under section 1 of the Law Reform Act, 1934, for lost earnings in the lost years, for the recovery of such damages was not excluded by section 1(2)(c) of that Act. It was also held that since the right of recovery for the lost earnings in the lost years vested in the son immediately before his death, the plaintiff as administrator of his estate was entitled to recover damages for the benefit of the estate.

A further appeal (with leave of the Court of Appeal) was then brought to the House of Lords on the Court of Appeal's decision confined to the construction of section 1(2)(c) of the Law Reform Act, 1934. This appeal was again dismissed in *Gammell* v. *Wilson & Ors.*[9] for the following reasons:

(a) On the true construction of section 1(2)(c) of the Law Reform 1934 Act the restriction on an estate recovering or being deprived of a 'loss or gain to his estate' consequent on a person's death applied only to a loss or gain directly consequent on the death and not to a loss or gain resulting from a right to recover damages which vested in the deceased immediately before his death and which then passed to the beneficiaries of his estate, *whether they were his dependants or not.* That construction, coupled with the principle that a cause of action for loss of earnings in the lost years vested in the deceased before he died (and in the case of instantaneous death vested in him immediately before he died) meant that the estate was not precluded by section 1(2)(c) from recovering damages for the deceased's loss of earnings during the lost years in a claim under the 1934 Act. Accordingly, even though it produced a result which was neither sensible nor just, the House of Lords was constrained to hold that a plaintiff was entitled to the damages for the lost years despite the fact that those damages far exceeded the amount to which he was entitled as a dependant of a deceased person.

(b) On the principle that damages for loss of earnings in the lost years should be fair compensation for

the loss suffered by the deceased in his lifetime, there was no room for conventional award. Accordingly, the court hearing the case was required to make the best estimate it could on the evidence available.

It is well settled law, therefore, that under our section 8(2)(c) of the Civil Law Act, 1956, which is *in pari materia* with section 1(2)(c) of the Law Reform Act, 1934, the plaintiff Thangevelu is entitled as administrator of the estate of his son to claim damages for the lost years of his son for the benefit of the said estate.

Counsel for the defendant while agreeing that this House of Lords decision settled the issue of construction of section 1(2)(c) of the Law Reform Act, 1934, before the Law Lords that an estate is entitled to claim for the lost years in England, this court was urged not to adopt the approach taken by the House of Lords as that decision was only of persuasive authority. To this contention I would, with respect, quote the observations of Raja Azlan Shah J. (as he then was) in *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee, Malaysia*[10] where his Lordship said at page 152:

"It is axiomatic that though our courts are not strictly speaking bound by decisions of the House of Lords, we have always recognised and continue to recognise their peculiarly high persuasive value. Moreover the reasoning of any judgment delivered in the House of Lords, whether dissenting or concurring, commands and must always command the utmost respect...."

Moreover, the issue raised by counsel for the defendant in his submission was the same issue that had been exhaustively discussed in the two House of Lords' cases in *Pickett's* and *Gammell's* and in my opinion no useful purpose will be served by my discussing the issue here. The final word has been said by the latest decision of the House and I am bound by this decision.

I accordingly decide that the plaintiff in this case is entitled to recover damages for the lost years. The next matter to be dealt with is the quantum of damages.

As to assessment of damages under this head for lost years I would quote the following passages from the speech of Lord Scarman (who also heard *Pickett's* appeal) in *Gammell* v. *Wilson* at page 593.

"The principle must be that the damages should be the fair compensation for the loss suffered by the deceased in his lifetime. The appellants in *Gammell's* case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made....

The problem in these cases, which has troubled the judges since the decision in *Pickett's* case, has been the calculation of the annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in this House in *Pickett's* case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations, based as they must be on events or contingencies of a life which he would not live, are out of place; the judge must make the best estimate based on the known facts and his prospects at time of death. The principle was stated by Lord Wilberforce in *Pickett's* case:

'The judgments, further, bring out an important ingredient, which I would accept, namely that the amount to be recovered in respect of earnings in the 'lost' years should be after deduction of an estimated sum to represent the victim's probable living expenses during those years. I think that this is right because the basis, in principle, for recovery lies in the interest which he has in making provision for dependants and others, and this he would do out of his surplus...."

I had, when dealing with the claim for loss of dependency under Head Three estimated the loss to the parents at $110 per month. For the purpose of this claim under Head Four for lost years, I am of the view that additional factors are involved. If I understand the relevant passages in the speeches of the two House of Lords' decisions correctly, two conditions must be satisfied before an assessment for lost years can be made, namely:

(a) there must exist on the evidence presented to court a pre-accident income of the deceased, and

(b) from this income there must be a monetary sum which the deceased would have been able to save after deduction of an estimated sum to represent his probable living expenses.

There was the evidence of the father that he was intending to take the boy out of school for the purpose of full-time employment but I warned myself that to embark on a consideration of his full area of employment for the purpose of assessing damages for the lost years would be basing the award on an income that would be too speculative or unpredictable. I shall, accordingly, confine myself to the evidence of pre-accident income of the deceased, which I had accepted at $160 per month.

What would then be the balance of this income which the deceased would have been able to save after meeting the cost of his living expenses. On the date of death the meals at home and pocket money provided by this father came up to $50. In view of the fact that as the boy grows older he would certainly be spending more on himself than on the date of the accident an estimated sum will have to be deducted before arriving at the amount which would have been at his disposal after meeting all his living expenses. Taking everything into consideration, I would fix this estimated deduction at $70 leaving the sum of $90 per month.

As this notional sum of $90 savings is from future pecuniary earings as distinct from actual pecuniary earnings, I am departing from the guidelines set out in *Cookson* v. *Knowles* in not dividing the proposed award into two parts as I did when dealing with the claim for dependency under Head Three by dividing into actual pecuniary loss and future pecuniary loss. To arrive at a reasonable sum for damages under this head I will apply a multiplier of 20 years

taking into consideration the reasonable duration of working life which the deceased, an odd job worker, would have but for the accident with a reduction for contingencies, and the fact that the estate will be getting a lump sum for the whole of this period. According to actuarial tables the savings of $90 per month on a multiplier of 20 years is $13,456.80. This in my opinion is the best estimate for the lost years based on pre-accident income.

To summarise, the assessments under the various heads are:

Head One for pain and suffering and loss of amenities, $20,000.

Head Two for loss of expectation of life under section 8 of the Civil Law Act, 1956, $4,000.

Head Three for loss of dependency under section 7 of the Civil Law Act, 1956, $14,185.60.

Head Four for lost years under section 8 of the Civil Law Act, 1956, $13,456.80.

My attention has been called to section 8(5) of our Civil Law Act, 1956, which reads:

"8(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

This subsection of our Act again is *in pari materia* with subsection 1(5) of the Law Reform Act, 1934, and in this connection I would quote what Lord Scarman said in his speech in *Gammell* v. *Wilson* (H/L) at page 591, when dealing with the English Act:

"Subsection (5) has some general significance. It makes clear that the rights which under the Act survive for the benefit of the estate are additional to, not a substitution for, the rights conferred on dependants by the fatal accidents legislation. In dealing, therefore, with a 'law reform' claim, the court has no regard to what dependants can claim under the Fatal Accidents Act. The converse is, however, not true. In assessing the loss of a dependency under the fatal accidents legislation the courts have always had regard to the benefits accruing to the dependants from the estate of the deceased. In most fatal accident cases, the dependants will, of course, be the beneficiaries of the estate. In such cases there will be no 'double recovery", by which is meant no recovery both by the estate and the dependants of damages calculated by reference to the lost earnings of the lost years; for the dependants' claim will be reduced or extinguished (subject to certain exceptions) by the benefits they receive from the estate. But, if the deceased has made a will leaving his estate, or a substantial part of it, to other than his dependants, both the estate and the dependants will have a claim."

As Thangavelu, the administrator and his wife will be the same persons benefitting under the above awards irrespective of whether the claims are under section 7 or section 8 of the Civil Law Act, 1956, and because the awards to be made for the benefit of the estate under section 8 exceeds the award for loss of dependency under section 7 the claim under section 7 is eliminated or extinguished by the amounts to be awarded under section 8 of the Civil Law Act, 1956.

I, therefore, make the following awards on the basis of 100% liability on the part of the defendant with interest thereon following the Federal Court decision in *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian*.[1]

(a) $20,000 for pain and suffering and loss of amenities with interest at 6% from date of service of writ to date of trial;

(b) $4,000 for loss of expectation of life with interest at 6% from date of service of writ to date of trial;

(c) $13,456.80 for lost years which will carry no interest;

(d) $850 agreed special damages (including funeral expenses) with interest at 3% from date of accident to date of trial.

As liability for the accident has been agreed at 50/50 I leave the matter of the arithmetical calculations on each of the awards to be paid by the defendant to the plaintiff to be worked out by counsel for the parties.

There will be an order for costs in favour of the plaintiff.

Order accordingly.

Solicitors: *R.K. Nathan & Co.; Tay, Tee & Co.*

TAN PUAN CHEE v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) March 6, 1981]

[Kuala Lumpur — Federal Territory Criminal Appeal No. 21 of 1980]

Landlord & Tenant — Rent-controlled premises — Offence and conviction — Appeal — Failure of learned Magistrate to invoke adverse presumption against prosecution for failing to call alleged four sub-tenants as witnesses — Control of Rent Act, 1966, s. 19(1)(a) & 19(c).

Evidence — Failure of learned Magistrate to invoke adverse presumption against prosecution for failing to call witnesses — Evidence Act, s. 114(g).

The appellant in this case was found guilty and convicted of an offence punishable under section 19(6) of the Control of Rent Act, 1966. She appealed against the said conviction on several grounds one of which was that the learned Magistrate had failed to invoke the adverse presumption against the prosecution under section 114(g) of the Evidence Act for their failure to call the alleged four sub-tenants as witnesses, although all of them were easily traceable.

Held, quashing the conviction and setting aside the sentence: (1) failure of the prosecution to call the alleged two sub-tenants as witnesses (the other two alleged subtenants had given evidence in favour of the appellant) should attract the adverse presumption under section 114(g) of the Evidence Act, in that, if they had been called, they would have given evidence against the prosecution as regards sub-letting;

(2) the failure of the learned Magistrate to consider whether the defence had raised a reasonable doubt in the prosecution case amounted to a misdirection in law as to the onus of proof placed on the defence; it is important that the court must give reason or reasons for rejecting the defence story.

Cases referred to:-

(1) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(2) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16.

(Cases cited but not mentioned in the judgment: *Abdul Rahim* v. *British & Malaya Trustees Ltd.* [1967] 1 M.L.J. 118; *Public Prosecutor* v. *Lim Kwai Thean* [1959] M.L.J. 179; *Maung Pein* v. *Ma The Ngwe* A.I.R. 1925 R. 143.)